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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

RICARDO M. FRANK, Petitioner

v.

LISA S. MORANDO, et al, Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

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STATEMENT OF THE CASE

Parties

Respondent (petitioner below) SARAH JUSTINE MORANDO (hereinafter "SARAH")[1/] is a minor child who was born on October 28, 1983. (C.T. 1, 10, 240). SARAH's mother is LISA MORANDO. (C.T. 1, 10, 240).

SARAH's mother was previously married to petitioner RICARDO FRANK (hereinafter "PETITIONER"). This marriage was entered into on April17, 1983 and terminated by a Judgment entered on March 6, 1985. (C.T. 1, 10)[2/].

1/ On November 14, 1988, SARAH's name was changed to SARAH JUSTINE MORANDO when, following entry of the Judgment of Non-Paternity discussed infra, she was adopted by JAMES MORANDO (C.T. 294-296).

2/ PETITIONER contends that he married SARAH's mother on February 22, 1983. The record reflects a factual dispute regarding whether a valid legal marriage occurred on that date (C.T. 148-149) although the existence of this factual dispute is not relevant to resolution of this case.

SARAH's birth occurred while this marriage was in effect. SARAH was, however, conceived prior to this marriage. (C.T. 3, 10, 187-188). Because SARAH was born during the marriage, though conceived prior to the marriage, PETITIONER became SARAH's presumed father pursuant to California Civil Code §-7004(a)(1) (C.T. 2, 10).

SARAH's mother and PETITIONER were legally separated a few days after SARAH's first birthday and divorced shortly thereafter. (C.T. 1, 10). SARAH's mother married JAMES MORANDO on June 14, 1986, and they subsequently had another child, SARAH's sister, AMANDA MORANDO (C.T. 28).

Blood Tests

In early 1987, PETITIONER stipulated to have blood tests taken to determine whether or not he was SARAH's natural father. (C.T. 56-57). The results of the two separate sets of blood tests established that PETITIONER could not be SARAH's natural father. (C.T. 263-

293). PETITIONER has conceded that he is not SARAH's natural father (C.T. 243)[3/].

Action For Declaration
of Non-Paternity

On April 15, 1987, shortly after the initial blood test results were issued, LISA MORANDO filed a petition pursuant to California Civil Code §7006(a)(2) seeking a judicial declaration of PETITIONER's non-paternity of SARAH. (C.T. 1-5). Based on the results of the blood tests, the petition sought to rebut the presumption under

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3/ PETITIONER asserts and apparently relies heavily on his allegation that, up until the blood tests, SARAH's mother allegedly concealed from him the possibility that he was not SARAH's father. There is absolutely no factual support for this assertion in the record (nor is this alleged fact relevant to any issue on this appeal). Moreover, SARAH's mother has asserted that, to the contrary, PETITIONER was at all times fully informed and aware of this possibility.

California Civil Code §7004(a)(1) that PETITIONER was SARAH's father[4/].

Appointment of Guardian
Ad Litem For Sarah

On June 22, 1987, LISA MORANDO filed a motion requesting appointment of a guardian ad litem for SARAH in the proceeding and seeking leave of court to add a separate cause of action brought solely on behalf of SARAH. (C.T. 14-16). Pursuant to stipulation between the parties, CATHY A. KELLEHER was appointed as guardian ad litem for SARAH in the proceed-

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4/ The presumption under Civil Code §7004(a)(1) is rebuttable. California Civil Code §7004(b) provides, in pertinent part, that:

> (b) Except as provided in Section 621 of the Evidence Code, a presumption under this section is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action. The presumption is rebutted by a court decree establishing paternity of the child by another man. (emphasis added).

See, In Re Olivia H., 196 Cal.App.3d 325, 241 Cal.Rptr. 792 (1987).

ing (C.T. 260-261). On August 10, 1987, the trial court entered an Order appointing CATHY A. KELLEHER as guardian ad litem for SARAH in the proceeding and granted leave to add a separate cause of action brought solely on behalf of SARAH. (C.T. 260-261).

On December 1, 1987, again pursuant to stipulation between the parties, LEE C. PEARCE, ESQ., appeared as counsel in the proceeding for SARAH, by her guardian ad litem, CATHY A. KELLEHER, and has at all times represented solely SARAH and her guardian ad litem in this proceeding. (C.T. 262).

Pre-Trial Rulings

Prior to trial, various cross-motions for summary judgment and summary adjudication of issues were filed by the parties. (C.T. 231-239). In response to a motion for summary adjudication of issues filed by SARAH, the trial court ruled that there was no substantial controversy and no material triable issue of fact with respect to each of the following

issues: (1) that the presumption of paternity prescribed by California Evidence Code §621 was inapplicable to PETITIONER; (2) that the only paternity presumption applicable to PETITIONER was that of California Civil Code §7004(a)(1); and (3) that SARAH brought this action within a reasonable time after obtaining knowledge of the relevant facts as required by California Civil Code §7006(a)(2). (C.T. 232).

Trial

Trial in the case was held on March 30, 1988.[5/] At trial, the declarations of the experts who had conducted the blood tests were admitted into evidence pursuant to stipulation. The Court then ordered the proceeding bifurcated so that the trial would proceed only as to the separate action brought

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[5/] At the trial, Lee C. Pearce, Esq. represented SARAH and her guardian ad litem CATHY A. KELLEHER; Peter G. Loewenstein, Esq. represented LISA and JAMES MORANDO; and Gary A. Cornwall, Esq. represented PETITIONER (C.T. 242).

by SARAH. Following this bifurcation of the proceeding and argument by counsel, SARAH rested her case. (C.T. 242-243).

Petitioner's Case At Trial

At the commencement of PETITIONER's case, PETITIONER's counsel stated that PETITIONER would offer no evidence to contradict the results of the blood tests. (C.T. 243). PETITIONER's counsel then stated that the only evidence that PETITIONER intended to offer would be evidence to show that SARAH's mother, LISA MORANDO, had allegedly failed to bring the action within a reasonable time after she obtained knowledge of relevant facts as required by California Civil Code §7006(a)(2). (C.T. 243). With this exception, PETITIONER's counsel stated that PETITIONER had no other evidence to present to the Court and offered none. (C.T. 243).

PETITIONER made no arguments, nor offered any evidence at trial relating to a claim that SARAH was not the "real actor" or concerning

any alleged bias of SARAH's guardian ad litem or her counsel. (C.T. 239-246). As the Statement of Decision entered by the trial court and approved as to form by PETITIONER's trial counsel unequivocally states, PETITIONER made no arguments, nor offered any evidence at trial other than a proffer of evidence to show that SARAH's mother had failed to bring the action within a "reasonable time" as required by California Civil Code §7006(a)(2) and the argument that, as a matter of law, SARAH should be bound as a result of her mother's alleged failure to bring the action in a timely manner. (C.T. 243-244).[6/]

[6/] PETITIONER attempts to color the Court's view of this appeal and generate sympathy with an inaccurate factual picture of the nature of his relationship with SARAH which is unsupported by the record. At trial, PETITIONER offered no evidence or testimony concerning his relationship with SARAH which he would now have this Court believe to be idyllic. It is not surprising that PETITIONER offered no such evidence at trial since at that time, pursuant to Court Order, PETITIONER was prohibited from any visitation or contact with SARAH due to the discovery of the

(continued...)

The trial court took this threshold legal issue under submission without receiving any evidence on the issue of whether SARAH's mother brought the action within a reasonable time. The trial court indicated that if it determined that SARAH would be barred as a matter of law by the untimeliness of her mother's action, it would schedule a further proceeding to hear and consider the evidence PETITIONER intended to offer to show that SARAH's mother had allegedly failed to bring the action in a timely fashion. (C.T. 244).

6/(...continued)
possibility that he had been sexually molesting her during prior visitations. (C.T. 297-299). At the time of trial, an independent expert in sexual abuse of young children had been appointed by the Court and was in the process of investigating the possibility that PETITIONER had sexually abused SARAH (C.T. 297-299). Based on subsequent Court Orders and the findings by the independent court-appointed expert that PETITIONER had repeatedly sexually molested SARAH, all visitation between PETITIONER and SARAH has been terminated since February 3, 1988, well over two years ago (C.T. 300-303).

In view of the fact that PETITIONER otherwise rested his case, the Court indicated that if it did not so rule, Judgment would be entered in favor of SARAH. (C.T. 244).

Entry of Judgment

After considering the matter, the trial court ruled that even if PETITIONER could prove that the action brought by SARAH's mother was untimely under California Civil Code §7006(a)(2), this would not bar SARAH as a matter of law on her own independent action under California Civil Code §7006(a)(2). (C.T. 236-237, 244-246). Accordingly, the trial court held that the existing presumption under California Civil Code §7004(a)(1) that PETITIONER was SARAH's father had been rebutted. (C.T. 244-246). Judgment was therefore entered declaring that PETITIONER was not SARAH's natural or legal father and that he had no parental rights or obligations with respect to SARAH. (C.T. 248-249). This

Judgment was entered solely on the separate action brought by SARAH.[1/]

Affirmance By California
Court of Appeal

PETITIONER's appeal of that Judgment was decided by the California Court of Appeal, First Appellate District on July 21, 1989. The California Court of Appeal affirmed the trial court's Judgment in its entirety. PETITIONER's petition for hearing by the California Supreme Court was denied on October 11, 1989. PETITIONER now petitions for issuance of a writ of certiorari from this Court.

[1/] No action was taken, nor any Judgment entered on the separate actions brought by LISA and JAMES MORANDO. Thus, PETITIONER'S assertion a cause of action by either LISA or JAMES MORANDO would have been barred as untimely under California Civil Code §7006 is mere conjecture.

SUMMARY OF ARGUMENT

The petition for writ of certiorari filed by PETITIONER completely ignores the standards set forth in Rule 10 of the Rules of the Supreme Court for granting a writ of certiorari. This is perhaps not surprising since this case can in no way meet those standards.

Review in this case is certainly not needed to resolve conflicting court decisions of any federal question -- there are simply no issues decided by the California Court of Appeal in this case which in any way conflict with any other decisions or precedent.

Nor is review necessary to settle any important question of federal law. The primary issue which the California Court of Appeal was required to decide in this case was whether the state trial court correctly determined that no triable issue of fact existed under the record to support its order granting partial summary judgment. That Order

correctly determined that the rebuttable presumption of paternity provided for in California Civil Code §7004 was applicable to PETITIONER rather than the presumption under California Evidence Code §621. Resolution of this issue merely required a review and determination concerning the factual record in the case and did not require consideration of any "important questions of law." Similarly, determination of each of the other issues raised by PETITIONER on appeal involved application of express California statutes or well-settled principles of law.

Indeed, there is simply no colorable question of federal law presented in this case. PETITIONER's contention that the application of California statutes which rebutted the prior legal presumption that he was SARAH's father (a legal presumption which was itself created by those same statutes) constitutes a violation of his constitutional due process rights is without support. While

in certain factual circumstances due process rights have been recognized in favor of biological fathers, there is no constitutional due process right to retain a legal presumption of paternity in the face of undisputed blood tests demonstrating that no biological relationship exists. Nor can PETITIONER complain of any procedural due process violation. In this case he had a full and complete opportunity to notice, hearing and a full trial on the issue of paternity.

In short, PETITIONER's request for issuance of a writ of certiorari is based, not on any appropriate ground for review set forth in Rule 10, but simply upon the unsupported assertion that the California Court of Appeal somehow erred in affirming the Judgment entered by the state trial court. In response, respondent SARAH MORANDO, acting through her court-appointed guardian ad litem, sets forth below an accurate statement of the facts of this case as reflected in the

record[8/], and a summary of the reasons why, based on the record in this case, the California Court of Appeal's affirmance of the Judgment entered by the trial court was correct in all respects.

ARGUMENT

I. THE TRIAL COURT AND CALIFORNIA COURT OF APPEAL PROPERLY HELD THAT CALIFORNIA EVIDENCE CODE §621 WAS INAPPLICABLE UNDER THE INDISPUTABLE FACTS OF THIS CASE

The trial court and the California Court of Appeal were correct in concluding that California Evidence Code §621 was inapplicable in this case because: (1) California Evidence Code §621 applies only when the child is conceived while the mother and presumed father are married; and (2) it is indisputable from

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[8/] The other major thrust of the petition is an attempt to persuade the Court to grant review based on sympathy which PETITIONER hopes will be generated through a misleading factual presentation of the case. PETITIONER's emotionally-charged factual portrayal of this case is unsupported by the record and inaccurate. Indeed, the petition fails to contain a single factual citation to the record.

the record is this case that SARAH was conceived before the marriage between PETITIONER and SARAH's mother.

A. California Evidence Code §621 Is Applicable Only When The Child Is Conceived While The Mother And Presumed Father Are Married.

It is well-settled under California law that Evidence Code §621 applies only where the child is conceived at a time when the mother and presumed father are married. The issue was apparently first decided by the California Supreme Court in Estate of McNamara, 181 Cal. 82, 183 P. 552 (1919) where the Court, in construing the predecessor statute to California Evidence Code §621, observed:

> Section 1962, subdivision 5, of the Code of Civil Procedure, provides: 'The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate.' Read literally this section would apply only where the wife is cohabiting with her husband at the time of issue, that is, of birth. This was not the fact in the present case. But putting upon the section the meaning it undoubtedly should have, namely that issue of a wife cohabiting with her husband at the time of conception must be indisputably presumed legitimate, it yet does not determine the present case, for it still

leaves open the very question involved of when was conception or during what period must it be presumed to have taken place. 181 Cal. at 91 (emphasis added.)

Since Estate of McNamara, supra, the statute has consistently been interpreted by the California courts to refer only to the time of the child's conception. Vincent B. v. Joan R., 126 Cal.App.3d 619, 623, 179 Cal.Rptr. 9 (1981); Jackson v. Jackson, 67 Cal.2d 245, 247, 60 Cal.Rptr. 649 (1967); Kusior v. Silver, 54 Cal.2d 603, 7 Cal.Rptr. 129 (1960); Louis v. Louis, 7 Cal.App.3d 851, 855, 86 Cal.Rptr. 834 (1970); Bonsall v. Bonsall, 169 Cal.App.2d 753, 756, 337 P.2d 843 (1959). See, also, Michael H. v. Gerald D., ___ U.S. ___, 109 S.Ct. 2333 (1989).[9/]

[9/] See generally, The Irrebuttable Presumption of California Evidence Code Section 621, 12 U.C. Davis Law Review 452, 455 (1979) ("The presumption of paternity under section 621 only arises when all four requirements are met. If the mother and presumed father are legally married, cohabiting at the time of conception, and the husband is both potent and fertile,

(continued...)

Any other interpretation of the statute would also be inconsistent with the legislative scheme in this area. The California Legislature has specifically provided for one presumption in California Evidence Code §621 which may be conclusive in the situation where the child is conceived while the parties are married. The California Legislature has also provided for a presumption of a different nature (i.e.,

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9/(...continued)
then the husband is irrebuttably presumed the legal father of a child born during the marriage.", emphasis added.)

The Uniform Parentage Act: What It Will Mean For The Putative Father In California, 26 Hastings Law Journal 191, 201 (1976) ("The statutes' requirement of cohabitation has been strictly construed to mean the living together of a man and woman as husband and wife at the time of probable conception.", emphasis original); California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy, 20 Stanford Law Review 754, 756 (1968) ("The basic conditions necessary for the application of the presumption are marriage and cohabitation at the time of conception.", emphasis added).

rebuttable) under California Civil Code §7004(a)(1) which applies in cases such as the present, where the child is conceived prior to the marriage, but born during the marriage or within 300 days after its termination. Compare California Evidence Code §621 with California Civil Code §7004(a)(1).

B. Sarah Was Conceived Prior To The Marriage Between Her Mother And Petitioner

On appeal, PETITIONER did not challenge this well-settled rule of California law. Instead, PETITIONER argued that there was a material factual dispute concerning whether, in the present case, the conception occurred during the marriage. However, the record in this case does not permit any conclusion other than that reached by both the state trial court and California Court of Appeal -- that SARAH was conceived prior to even the date PETITIONER contends the marriage occurred.

The Declaration of John Girard, M.D., who is the obstetrician who provided prenatal care

to SARAH's mother and assisted with SARAH's birth, conclusively established that conception occurred on or before January 24, 1983. (C.T. 187-188). As the sworn declaration of Dr. Girard in the record states, Dr. Girard examined SARAH's mother on March 8, 1983, just 15 days after the date PETITIONER contends the marriage occurred. On that date, Dr. Girard heard SARAH's heart tones, something that would be medically impossible for a child conceived just 15 days previously. (C.T. 188). Accordingly, Dr. Girard declared that would have been medically impossible for SARAH to have been conceived on or after February 22, 1983, the date respondent contends the marriage occurred. (C.T. 187-188). PETITIONER offered no evidence to the trial court to contradict or refute this conclusive evidence.

Moreover, PETITIONER has judicially admitted in this proceeding that conception occurred prior to the marriage. The Amended

Answer filed by PETITIONER in this action, which he verified, unequivocally states that:

> "At the time of the marriage, Plaintiff was pregnant with the parties daughter Sarah Frank who was born after the marriage between plaintiff and defendants." (Amended Answer to Petition for Declaration of Non-paternity, ¶2. (C.T. 10-12).

Under California law, PETITIONER is bound by, and cannot later controvert, the judicial admission in his verified Answer that conception occurred prior to the marriage. See e.g., Electronic Equipment Express v. Seiler & Co., 122 Cal.App.3d 834, 850, 176 Cal.Rptr. 239 (1981) (admissions made by a party in their pleadings are binding on that party); Smith v. Heller & Co., 82 Cal.App.3d 259, 269, 147 Cal.Rptr. 1 (1978) (Id.); Walker v. Dorn, 240 Cal.App.2d 118, 49 Cal.Rptr. 362 (1966) (Id.) As Bernard Witkin notes:

> A judicial admission in a pleading (either by affirmative allegation or by failure to deny an allegation) is entirely different from an evidentiary admission. The judicial admission is not merely evidence of a fact; it is a conclusive concession of the truth of

> the matter which has the effect of removing it from the issues.

Witkin, California Evidence, ¶644, p. 630 (3d Ed. 1986) (emphasis added).

PETITIONER also argued that a material factual dispute was somehow created by the Petition for Dissolution of Marriage filed by SARAH's mother in the prior marital dissolution proceeding in which she alleged that SARAH was a "child of the marriage". (C.T. 152-153). This statement, however, does not constitute an admission by SARAH's mother concerning the date of conception. Moreover, even if it was, under California law such an admission in a pleading filed in another proceeding is simply not binding on SARAH in this proceeding. See e.g., 4 Witkin, California Procedure, Pleading, §407 (3rd Ed. 1985). Furthermore, even if a pleading filed by SARAH's mother in the prior marital dissolution proceeding were entitled to some evidentiary value in this proceeding, it can

in no way overcome the uncontradicted medical evidence that SARAH's conception occurred prior to the marriage and PETITIONER's judicial admission in this proceeding to the same effect.

PETITIONER's argument that California Evidence Code §621 should be construed to apply whenever it is scientifically possible for conception to have occurred during the marriage, notwithstanding irrefutable medical evidence that SARAH'S conception did not occur during the marriage, is without any support either under California law or logic. PETITIONER's attempted reliance on Dazey v. Dazey, 50 Cal.App.2d 15, 122 P.2d 308 (1942) is misplaced. Dazey v. Dazey, supra, merely holds that, in the absence of other evidence as to when conception occurred, it is not error for a trial court to infer that conception occurred during the marriage on the basis of evidence establishing that it would not have been scientifically impossible for

the conception to have occurred during the marriage. 50 Cal.App.2d at 21. Here, no such inference was permissible in the face of the uncontradicted medical evidence and PETITIONER's judicial admission.

II. CALIFORNIA CIVIL CODE §7006 (a)(2) EXPRESSLY PROVIDES THAT A MINOR CHILD MAY BRING AN ACTION INDEPENDENT FROM THEIR PARENT THROUGH A COURT-APPOINTED GUARDIAN AD LITEM TO OBTAIN A JUDICIAL DECLARATION OF THE NON-PATERNITY OF A PRESUMED FATHER

PETITIONER also asserts that the trial court and California Court of Appeal somehow erred in recognizing SARAH's independent standing to bring an action to obtain a judicial declaration of PETITIONER's non-paternity. PETITIONER ignores the express statutory authorization provided in California Civil Code §7006(a)(2) which permits a minor child to bring an action independent of her mother to rebut a California Civil Code §7004(a)(1) presumption and obtain a judicial declaration of the non-paternity of a presumed

father. California Civil Code §7006(a)(2), provides, in pertinent part:

> A child, the child's natural mother, or a man presumed to be the child's father under Paragraphs (1) (2) or (3) of subdivision (a) of Section 7004 may bring an action as follows:
>
> * * *
>
> (2) For the purpose of declaring the nonexistence of the father and child relationship presumed under paragraph (1), (2), or (3) of subdivision (a) of Section 7004 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. (emphasis added).

By the use of the words "A child" in California Civil Code §7006(a), the California Legislature intended and provided that a minor child is entitled to bring an action under California Civil Code §7006 separate and independent from her mother's right to bring such an action. California Civil Code §7008 also expressly provides that a minor child bringing an action under California Civil Code §7006 shall be represented by a guardian ad litem appointed by the Court.

In the present case, in accordance with this express statutory authorization, SARAH brought an independent action on her own behalf to obtain a judicial declaration of the non-existence of the presumed father and child relationship between herself and PETITIONER. (C.T. 28-29). In accordance with California Civil Code §7008, SARAH brought this action through a court-appointed guardian ad litem, CATHY A. KELLEHER. (C.T. 260-261).

PETITIONER's suggestion that SARAH has no independent standing in the present action is thus unsupported and, moreover, contrary to the express statutory authorization provided by the California Legislature. The independent standing of a minor child to bring an action to obtain a judicial declaration of the non-paternity of the child's presumed father was also specifically recognized and upheld in Adoption of Stroope, 232 Cal.App.2d 581, 583, 43 Cal.Rptr. 40 (1965) (minor child represented by mother as guardian ad litem has

standing to bring an action to rebut the presumption that her mother's husband was the child's father). As the California Court of Appeal in Ruddock v. Ohls, 91 Cal.App.3d 271, 281, 154 Cal.Rptr. 87 (1979) noted: "The child has important rights of her own."

PETITIONER has asserted for the first time on appeal that SARAH and her court-appointed guardian ad litem somehow did not act independently or were otherwise not the "real actors" in the proceeding.[10/] There is absolutely no support in the record for this contention. At no time during the proceedings in the trial court did PETITIONER ever object to any action taken by SARAH's guardian ad litem on the grounds that she was not acting independently on SARAH's behalf or was

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[10/] Having failed to raise this argument in the trial court, PETITIONER is precluded under California law from asserting this theory on appeal. See, e.g., Fenton v. Board of Directors, 156 Cal.App.3d 1107, 1113, 203 Cal.Rptr. 388 (1984); 9 Witkin, California Procedure, Appeal, § 311 (3rd Ed. 1985).

otherwise not acting in a proper representative capacity. Indeed, PETITIONER stipulated both to the appointment of CATHY A. KELLEHER as guardian ad litem for SARAH and to the appointment of LEE C. PEARCE, ESQ. as attorney for SARAH by her guardian ad litem. (C.T. 260-262).

III. THE DETERMINATION THAT CALIFORNIA EVIDENCE CODE SECTION 621 IS INAPPLICABLE TO PETITIONER DOES NOT VIOLATE PETITIONER'S DUE PROCESS RIGHTS

PETITIONER contends that the California Court of Appeal's failure to apply California Evidence Code §621 and declare him conclusively presumed to be SARAH's father violates his federal constitutional due process rights. As the opinion of the California Court of Appeal in this case correctly observes, any due process rights which may exist with respect to the application of the conclusive presumption of paternity in California Evidence Code §621 are limited to biological fathers -- which

PETITIONER is undisputedly not. While such due process rights may not extend to all biological fathers (see, Michael H. v. Gerald D., ___ U.S. ___, 109 S. Ct. 2333, 2342 (1989)), as a threshold matter they certainly do not extend to a person such as PETITIONER who is indisputably not SARAH's biological father. Indeed, what PETITIONER complains he has been deprived of is simply a legislatively created statutory presumption -- not any constitutionally protected right.

Moreover, unlike the situation in Michael H. v. Gerald D., ___ U.S. ___, 109 S. Ct. 2333 (1989) and related cases[11], here PETITIONER does not seek to constitutionally challenge the application of California Evidence Code §621 because it precludes him the right to a

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[11] Compare, e.g., Stanley v. Illinois, 405 U.S. 645 (1972); Quillain v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 463 U.S. 248 (1983); Michelle W. v. Ronald W., 39 Cal.3d 354, 216 Cal.Rptr. 748 (1985).

hearing or adjudication on the issue of paternity. Rather, what PETITIONER complains of is the failure to apply a conclusive legal presumption to declare him as SARAH's father notwithstanding the absence of any biological relationship.

Indeed, in this case, SARAH, through her court-appointed guardian ad litem, has invoked the provisions of a statutory scheme (e.g., California Civil Code §7004(b) and §7006(a)(2)) which expressly provides for adjudication of the issue of her paternity rather than preclude such an adjudication (such as when the conclusive presumption of California Evidence Code §621 prevents a biological father from establishing paternity). As such, the present case presents no federal due process issue whatsoever. PETITIONER has had a full right and opportunity to a hearing on the issue of his alleged paternity of SARAH and can

complain of no deprivation of federal due process rights.

PETITIONER's request that the Court make its own "public policy" determination and potentially override a carefully crafted sate legislative scheme such as the Uniform Parentage Act, California Civil Code sections 7000 et seq., should be rejected. The public policies with respect to a child's right to a judicial determination of her own paternity which PETITIONER argues the trial court should have weighed and evaluated have already been considered and decided by the California Legislature. By enacting California Civil Code §7006(a)(2) and §7004(b), the California Legislature has determined that the presumption of paternity (which the legislature itself created under California Civil Code §7004(a)(1)) shall be rebutted by evidence of blood tests which disprove the presumed father's paternity of the child. See, e.g., In Re Olivia H., 196 Cal.App.3d

325, 241 Cal.Rptr. 792 (1987); California Civil Code §7004(b) (the presumption "is rebutted by a court decree establishing paternity of the child by another man". (emphasis added)). Under this legislative scheme, if blood tests disprove paternity of the presumed father the presumption is rebutted irrespective of any balancing of possible competing policy interests. See, In Re Olivia H., 196 Cal.App.3d 325, 241 Cal.Rptr. 792, 795 (1987).

The legislative scheme and the cases under it do not say anything about first determining that the rebuttal must be balanced against any supposed competing public policy considerations. If the California Legislature felt it necessary to require a balancing of any competing public policies and private interests as a prerequisite to an action by a child for a declaration of the non-paternity of her presumed father, it would have said so in the statutes. Any public policy

considerations with respect to application of these statutes are the province of, and have already been determined by, the California Legislature.

IV. SARAH WAS NOT BARRED BY COLLATERAL ESTOPPEL FROM ESTABLISHING PETITIONER'S NON-PATERNITY

PETITIONER also argued below that SARAH's action should be barred by collateral estoppel because, he contends, the stipulated judgment which dissolved the marriage between PETITIONER and SARAH's mother constitutes a prior adjudication of SARAH's paternity which operates to bar SARAH from establishing PETITIONER's non-paternity in this case. (C.T. 155-158).[12/]

12/ As a threshold matter, PETITIONER is barred from attempting to rely on appeal upon a defense which he failed to assert during the trial below. See, e.g., Fenton v. Board of Directors, 156 Cal.App.3d 1107, 1113, 203 Cal.Rptr. 388 (1984); 9 Witkin, California Procedure, Appeal, §311 (3rd Ed. 1985). PETITIONER did not assert at trial that SARAH was barred under the doctrine of collateral estoppel (C.T. 243-244). Nor did PETITIONER even request at

(continued...)

A. Sarah Was Not A Party To The Prior Dissolution Action And Is Therefore Not Bound By Any Alleged Determination Of Her Paternity In The Marital Dissolution Judgment

Any determination of SARAH's paternity which may be reflected by the Stipulated Judgment of Marital Dissolution terminating the marriage between PETITIONER and SARAH's mother cannot be binding upon SARAH in this action because SARAH was not a party to the prior marital dissolution proceeding. It is well-established rule under California law that the issue of a child's paternity determined in a marital dissolution action is

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12/(...continued)
trial that the court take judicial notice of the Judgment dissolving the marriage between SARAH's mother which he now contends constitutes a prior adjudication of SARAH's paternity (C.T. 243-244).

Indeed, PETITIONER did not even plead the affirmative defenses of res judicata or collateral estoppel. (C.T. 6-12). Under California law by failing to plead these affirmative defenses he waived them. See, e.g., Dillard v. McKnight, 34 Cal.2d 209, 219, 209 P.2d 387 (1949); Strong v. Owens, 91 Cal.App.2d 336, 339, 205 P.2d 48 (1949).

not binding on the minor child unless the child was a party to the action. Ruddock v. Ohls, 91 Cal.App.3d 271, 278, 154 Cal.Rptr. 87 (1979); Adoption of Stroope, 232 Cal.App.2d 581, 583, 43 Cal.Rptr. 40 (1965); Daniels v. Daniels, 143 Cal.App.2d 430, 300 P.2d 335 (1956). See also, Gonzales v. Pacific Greyhound Lines, 34 Cal.2d 749, 753, 214 P.2d 809 (1950).

Adoption of Stroope, 232 Cal.App.2d 581, 43 Cal.Rptr. 40 (1965) is directly on point. In Adoption of Stroope, supra, Aleta, a minor child, brought an action together with her stepfather to obtain a judicial declaration of non-paternity of her mother's former husband, Harold. Harold contended that Aleta was barred from contesting his paternity under the doctrines of res judicata and collateral estoppel because the issue of his paternity of Aleta had been previously litigated and decided in the prior divorce action between himself and Aleta's mother.

The California Court of Appeal affirmed the Judgment entered by the trial court declaring that Harold was not Aleta's father holding that Aleta was not bound by the divorce decree because she was not a party to the divorce action. 232 Cal.App.2d at 581, 43 Cal.Rptr. at 43. As the California Court of Appeal in Adoption of Stroope, supra, stated:

> Here it is Aleta, the child of Mildred, who asserts that appellant Harold is not her natural father. Aleta was not a party to the divorce action, and she is not bound by the determination of her status made in that proceeding. The divorce action is not res judicata as to her, nor is she estopped thereby from contesting the question of her legitimacy. 232 Cal.App.2d at 581, 43 Cal.Rptr. at 43.

Similarly, in Ruddock v. Ohls, 91 Cal.App.3d 271, 278, 154 Cal.Rptr. 87 (1979) the Court held:

> To hold a child bound prospectively by a finding of non-paternity in a divorce action in which the child was not a party would be to allow the conduct of the mother to foreclose the most fundamental right a child possesses in our system of jurisprudence. Considering present-day realities, not every question of paternity raised and decided in a marital dissolution action involves a full adversary hearing on the subject. It is

> not uncommon for such an issue raised in the pleadings to be decided pro forma because the mother is reticent to be subjected to scrutiny about past dalliances. The emotional experience and psychological trauma of having one's personal life unveiled can act as a deterrent. Guilt feelings over the dissolution, favorable concessions on support or property can influence the vigor with which the paternity question is presented to the court. . . . To bind the child by the discretion or indiscretion, as the case may be, of the mother in choosing counsel or trial tactics in a divorce action without formal joinder, is to confer upon the mother the right to determine a child's most fundamental right next to life itself. 91 Cal.App.3d 278, 154 Cal.Rptr. at 91-92.

Because SARAH was not a party to the prior marital dissolution action between her mother and PETITIONER, she is not bound by any determinations made in that action regarding her paternity.

This is particularly true in the factual circumstances in this case, where the alleged prior adjudication of paternity is reflected by a stipulated marital dissolution judgment. Even if SARAH's mother and PETITIONER intended to stipulate or enter into an agreement

regarding SARAH's paternity, or intended to stipulate that PETITIONER's status as presumed father under California Civil Code §7004(a)(1) could never subsequently be rebutted or challenged, such an agreement would be ineffective as to SARAH. As California Civil Code §7006(e) unequivocally states:

> Regardless of its terms, an agreement between an alleged or presumed father and the mother or child does not bar an action under this section. California Civil Code §7006(e) (emphasis added).

See also, Everett v. Everett, 57 Cal.App.3d 65, 69, 129 Cal.Rptr. 8 (1976); Daniels v. Daniels, 143 Cal.App.2d 430, 435-36 300 P.2d 335 (1956); Berry v. Chaplin, 74 Cal.App.2d 652, 657, 660, 169 P.2d 442 (1946).

V. CONCLUSION

For the reasons stated above, the petition for issuance of writ of certiorari should be denied.

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Respectfully submitted,

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